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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN TAYLOR KOUGH,

Defendant and Appellant.

A153531

(Napa County
Super. Ct. No. CR180921)

A jury convicted Bryan Taylor Kough of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a) (4)) and the trial court sentenced him to probation for three years subject to various conditions. Kough contends the condition requiring him to obtain his probation officer's permission before traveling outside of the state (travel condition) is unconstitutionally overbroad. He also argues the trial court improperly delegated its authority to the probation officer to determine whether he is required to enroll in the Community Corrections Service Center program (program enrollment condition), which, if required, entails mandatory chemical testing and prohibits non-prescription drug use (drug condition or drug/chemical testing condition). Kough contends the drug condition is invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). We conclude the travel condition is within constitutional bounds. However, we remand the matter to permit reconsideration of the imposition of the program enrollment condition and the related drug condition. We otherwise affirm the judgment and the probation order.

I. BACKGROUND

A. *Procedural History*

On September 8, 2016, appellant was charged in a criminal complaint with assault by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(4).)

On September 21, 2016, the court suspended proceedings pursuant to Penal Code section 1368 and referred appellant for an assessment regarding his competency. On November 7, 2016, the court found appellant not competent to stand trial. On January 11, 2017, the court committed appellant to Napa State Hospital for three years or until his mental competency had been restored.

On July 24, 2017, the court found that appellant had been restored to competency and was able to stand trial. Following a preliminary examination, an information was filed on August 3, 2017, charging appellant with assault by means of force likely to produce great bodily injury in count 1 (Pen. Code, § 245, subd. (a)(4)) and criminal threats in count 2 (Pen. Code, § 422). (CT 76–77.) On October 6, 2017, the court granted appellant’s motion to dismiss count 2 based on insufficient evidence.

On November 3, 2017, a jury found appellant guilty of assault by means of force likely to produce great bodily injury. On November 30, 2017, the court suspended imposition of sentence and placed appellant on probation for three years.

B. *Facts*

On the afternoon of September 6, 2016, Napa County Sheriff’s deputies were dispatched to a report of two men fighting on Highway 29. The deputies identified the men as appellant and his step-father Dan Young. Young had been married to appellant’s mother for 21 years, since appellant was 29 years old. At the time of trial, appellant was 50 years old and Young was 63. Appellant was in regular weekly contact with his mother and saw Young on holidays. Young had no recent problems with appellant, and appellant had never been violent towards him in the past.

On the day of the incident, Young, at his wife’s request, had been helping appellant move. After helping load appellant’s belongings into his pickup truck, Young drove with appellant in the passenger seat. As Young was driving on Highway 29 in

Napa, appellant said he wanted to spend the day with Young. Young, who worked for a roofing company, said he had appointments. Young said he would drop off appellant and his things. Appellant suddenly removed his seatbelt and began hitting Young hard in the face and upper body. Young estimated he was driving 60 miles per hour at the time. Young stopped his truck in the middle of the road and traffic, and got out.

Appellant followed Young out of the truck and continued hitting and kicking him. Appellant hit Young more than 20 times during the altercation: over 10 times in the truck and over 10 times in the street. Appellant kicked Young at least four times. Appellant repeatedly and loudly yelled “you killed your son, you killed your son.” Young, whose son died of a heroin overdose in 2015, did not understand the accusation.

Nadine Yanez, was driving on the highway and witnessed the altercation. She saw a truck stopped in the road. Someone inside was yelling for help and struggling to get out. When the driver got out, he had blood running down his face. She saw appellant approach the driver and punch him as the driver tried to defend himself. She testified that appellant looked like the aggressor in the altercation. John James, a truck driver at the scene told deputies that he tried to stop the fight.

Napa County Deputy Sheriff Matt Macomber testified that he responded to the scene and found Young bleeding from his right ear. Young also had a scratch on his left cheek, as well as other bruising and swelling around his face. Appellant seemed to be “in a little bit of crisis and could use some help.” Appellant was not making sense, in Deputy Macomber’s view. Appellant told Deputy Macomber that he got angry when Young would not drive him where he wanted to go, and complained that Young had told him he would be “shot in the head” by police. Appellant was “pissed off” at Young and admitted that he began punching him after Young made a snickering sound. He told Deputy Macomber: “[Young] was texting people whatever cops that he knows or people that he knows to shoot me in the head no matter where I go. So either way I’m fucked. I figure why not just start[] it right there.”

The parties stipulated that Young’s son died of acute heroin and alcohol intoxication; the death was ruled an accident.

II. DISCUSSION

A. *Applicable Law and Standard of Review*

“ ‘Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation.’ (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*)). A grant of probation is ‘qualitatively different from such traditional forms of punishment as fines or imprisonment. Probation is neither “punishment” (see [Pen. Code,] § 15) nor a criminal “judgment” (see [Pen. Code,] § 1445). Instead, courts deem probation an act of clemency in lieu of punishment [citation], and its primary purpose is rehabilitative in nature [].’ (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.) Accordingly, . . . a grant of probation is an act of grace or clemency, and an offender has no right or privilege to be granted such release. (*People v. Anderson* (2010) 50 Cal.4th 19, 32.) Stated differently, ‘[p]robation is not a right, but a privilege.’ (*People v. Bravo* (1987) 43 Cal.3d 600, 608.).” (*People v. Moran* (2016) 1 Cal.5th 398, 402.)

“If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence. [Citations.] Additionally, at the sentencing hearing, a defendant can seek clarification or modification of a condition of probation. ([Citation.] [‘Oral advice at the time of sentencing . . . afford[s] defendants the opportunity to clarify any conditions they may not understand and intelligently exercise the right to reject probation granted on conditions deemed too onerous’]; see also Pen. Code, § 1230.3, subd. (a) [‘The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence.’].)” (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

Trial courts are granted broad discretion under Penal Code section 1203.1 to impose conditions of probation. (*People v. Penoli* (1996) 46 Cal.App.4th 298, 302.) This discretion, however, is not unlimited. (*Ibid.*) “[A] condition of probation must serve a purpose specified in the statute.” (*Carbajal, supra*, 10 Cal.4th at p. 1121.) In addition, a probation condition must meet the *reasonableness* standard of *Lent*, under

which conditions that relate to conduct that is not itself criminal must be “reasonably related to the crime of which the defendant was convicted or to future criminality.” (*Lent, supra*, 15 Cal.3d at p. 486.)

Under the *Lent* reasonableness test, there are three questions to address for any probation condition: Is it unrelated to the offense at issue? Does it relate to conduct that is not in itself criminal? Does it require or forbid conduct unrelated to future criminality? (See *People v. Olguin, supra* 45 Cal.4th at pp. 379–380 [discussing *Lent*].) The *Lent* test “is conjunctive,” which means that if the answer to all three questions is *yes*, the condition is invalid under *Lent*, and conversely if the answer to any of the questions is *no*, the condition is valid under *Lent*. (See *ibid.*)

B. Travel Condition (No. 8)

The trial court imposed the following probation condition: “8. Do not leave California without the permission of the Probation Officer. You waive extradition to the [S]tate of California from any jurisdiction in or outside of the United States where you may be found.” Appellant contends the portion of the condition requiring him to obtain approval before leaving California is unconstitutionally overbroad. He requests that we modify the condition to require that he “notify” his probation officer of his plans to travel out of state rather than seek permission.

Appellant acknowledges that he did not object below but contends that his overbreadth argument presents a facial challenge involving pure questions of law based on undisputed facts, which may be addressed for the first time on appeal. Accordingly, appellant asserts that we need only focus on the constitutionality of the condition, not whether it is reasonable as applied to him. Alternatively, he contends that his counsel was ineffective for failing to object to this condition. Assuming, without deciding, that the issue has been preserved on appeal, we conclude it fails on the merits.

Whether a term of probation is unconstitutionally overbroad presents a question of law, which we review *de novo*. (See, e.g., *In re J.H.* (2007) 158 Cal.App.4th 174, 183.) “If a probation condition serves to rehabilitate and protect public safety, the condition may ‘impinge upon a constitutional right otherwise enjoyed by the probationer, who is

“not entitled to the same degree of constitutional protection as other citizens.” ’ ’ ”
(*People v. O’Neil* (2008) 165 Cal.App.4th 1351, 1355.) “A restriction is unconstitutionally overbroad . . . if it (1) ‘impinge[s] on constitutional rights,’ and (2) is not ‘tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.’ [Citation.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

The right to travel and freedom of association are “constitutional entitlements.” (*People v. Bauer* (1989) 211 Cal.App.3d 937, 944.) However, as noted, a probation condition may restrict these rights so long as it reasonably relates to rehabilitation and public safety. (*People v. O’Neil, supra*, 165 Cal.App.4th at p. 1355.) As the California Supreme Court recently observed: “Imposing a limitation on probationers’ movements as a condition of probation is common, as probation officers’ awareness of probationers’ whereabouts facilitates supervision and rehabilitation and helps ensure probationers are complying with the terms of their conditional release. (See, e.g., *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 220 [probation condition prohibited defendant from leaving the state without permission]; *People v. Vogel* (1956) 46 Cal.2d 798, 806 (dis. opn. of Shenk, J.) [same]; *People v. Cruz* (2011) 197 Cal.App.4th 1306, 1309 [probation condition prohibited defendant from leaving the county or state without permission].)” (*People v. Moran, supra*, 1 Cal.5th at p. 406.) Thus, “[a]lthough criminal offenders placed on probation retain their constitutional right to travel, reasonable and incidental restrictions on their movement are permissible.” (*Id.* at pp. 406, 407 [a probation condition requiring the probationer to stay away from all Home Depot stores in California and adjacent parking lots did not infringe on the defendant’s constitutional right to travel].)

Appellant relies on *People v. Bauer, supra*, 211 Cal.App.3d 937 and *People v. Soto* (2016) 245 Cal.App.4th 1219, in which probation conditions restricting the

defendants' residence and travel were struck down. In *People v. Bauer*, the trial court imposed a probation condition that was designed to prevent the defendant from living with his overprotective parents, even though nothing in the record suggested the defendant's home life contributed to his crimes or that living with his parents was reasonably related to future criminality. (*People v. Bauer, supra*, 211 Cal.App.3d at p. 944.) While noting that probation conditions requiring approval before traveling or moving can be appropriate under some circumstances, the Court of Appeal held that in the defendant's case, the condition impinged on his constitutional right to travel and freedom of association because it forbade him "from living with or near his parents—that is, the power to banish him." (*Ibid.*)

In *People v. Soto, supra*, 245 Cal.App.4th 1219, the Court of Appeal struck down a probation condition requiring the defendant, who was convicted of driving under the influence of alcohol and with a suspended license, to obtain prior approval before changing his place of residence from Monterey County or leaving the state. (*Id.* at p. 1226.) The Court of Appeal did not reach the question whether the condition was constitutionally overbroad, but held it was unreasonable under the facts of its case and therefore an abuse of discretion to impose it. (*Ibid.*) The Court of Appeal stated, "like the *Bauer* defendant, there is nothing in the record to indicate that defendant's living situation contributed to his crime or would contribute to his future criminality. The only mention of defendant's living situation is contained in the probation report, which indicated that defendant had a stable residence and was living with his brother. In sum, there is nothing to suggest that leaving Monterey County or the State of California would have an effect on defendant's rehabilitation." (*Ibid.*)

The instant case is distinguishable. Appellant had a history of homelessness and instability, mental health issues, and failure to take prescribed psychiatric medication. He was diagnosed as schizophrenic, he did not believe he had a mental illness, and he had refused to take his medication. The ban on leaving the state without the probation officer's permission served a legitimate rehabilitative purpose and was narrowly tailored to appellant's needs.

Appellant was a risk to himself and others unless he took his medication. He had no stable home or job. At the sentencing hearing, defense counsel acknowledged that appellant was “unfortunately homeless.” In order for the probation officer to supervise appellant and to ensure that appellant was taking his medication and was law-abiding, it was necessary for his probation officer to be able to monitor appellant’s movements. At the sentencing hearing, defense counsel acknowledged that the “main concern” was that appellant be supervised. Appellant’s departure out of California, without advance permission from his probation officer, would obviously thwart the probation officer’s ability to supervise him.

Finally, we are not persuaded by appellant’s argument that the travel condition is constitutionally overbroad because it gave probation “unfettered discretion” in deciding whether to allow appellant to leave the state. He relies on *People v. O’Neil*, *supra*, 165 Cal.App.4th 1351, 1354, 1359, in which our colleagues in Division Three of this district court struck down an “entirely open-ended” and overly restrictive probation condition that prohibited the defendant from associating “socially, [or being] present any time, at any place, public or private, with any person, as designated by your probation officer.” The case is distinguishable, however, because a probation condition prohibiting a defendant from associating with or being in the presence of any person unless approved of by probation affects the daily activities of the defendant and is far more restrictive than a condition involving out-of-state travel, which is an issue that may come up only periodically within a probationary period. Furthermore, the condition in *People v. O’Neil* was considered overbroad because it was “unlimited and would allow the probation officer to banish [the] defendant by forbidding contact with his family and close friends, even though such a prohibition may have no relationship to the state’s interest in reforming and rehabilitating [him.]” (*Id.* at p. 1358.) In contrast, as we have previously discussed, the probation condition in this case is rationally related to the state’s interest in reforming and rehabilitating appellant.

Moreover, there is nothing to suggest that appellant’s reasonable requests to travel out of state would be disapproved. We view the travel condition here in light of our

Supreme Court’s admonition that probation conditions “should be given ‘the meaning that would appear to a reasonable, objective reader’ ” (*People v. Olguin, supra*, 45 Cal.4th at p. 382, quoting *People v. Bravo* (1987) 43 Cal.3d 600, 606), and presume that a probation officer will not withhold approval for reasons that are irrational or capricious. (*Olguin, supra*, 45 Cal.4th at p. 383.) A “probation department’s authority to ensure compliance with terms of probation does not authorize irrational directives by probation officer[s].” (*Ibid.*, citing *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240–1241.)

In sum, we conclude that the travel condition here is not unconstitutionally overbroad.

B. Program Enrollment Condition (No. 17) and Related Drug Condition (No. 18)

The trial court imposed the following conditions: “17. Enroll in and successfully complete the Community Corrections Service Center program *if required* by the Probation Officer. Your Probation Officer has the discretion to release you from jail to participate in the program, and also can return you to jail to serve any or all of the remainder of your term. If you successfully complete the program you will not have [to] serve the remainder of your term. [¶] 18. If ordered to participate in the Community Corrections Service Center program, as part of the program requirement, you must submit to chemical testing and not use, consume or possess any non-prescribed or illegal substances including medical marijuana, unless specifically authorized by the court.” (Italics added.)

At the sentencing hearing, the parties discussed the propriety of drug testing conditions. The prosecutor requested a drug testing condition to ensure appellant was complying with the court’s order to take anti-psychotic medications. Defense counsel objected to drug testing, noting that there was no evidence the offense was in any way drug related. Defense counsel argued “that imposing . . . drug conditions or testing [were not] reasonably related to the case” and should not be imposed as a condition of probation. The court agreed there was no evidence the offense was drug-related, but continued its ruling on the issue until a later hearing could be held on whether anti-

psychotic medications would be ordered as a condition of probation. The parties did not specifically discuss the drug testing term in the context of condition number 18, or appellant's participation in the Community Corrections Service Center program described in condition number 17. Subsequently, the trial court imposed a medication condition in number 19, but there was no further discussion regarding drug testing.

Although defense counsel did not specifically object to condition number 18, the prosecution and the court were clearly put on notice as to the factual basis for this challenge. Accordingly, we conclude the issue is preserved on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 437 [“If the trial objection fairly informs the court of the analysis it is asked to undertake, no purpose is served by formalistically requiring the party also to state every possible legal consequence of error merely to preserve a claim on appeal that error in overruling the objection had that legal consequence.”]) As to appellant's failure to raise a claim of improper delegation in the trial court, we exercise our discretion to consider this issue. (*People v. Williams* (1998) 17 Cal.4th 148, 161–162, fn. 6.)

Appellant contends the enrollment condition (No. 17) establishes an unconstitutional delegation of judicial authority and that the related drug condition (No. 18) is invalid under *Lent*.

1. Program Enrollment Condition (No. 17)

Appellant argues that condition number 17, that he “[e]nroll in and successfully complete the Community Corrections Service Center program *if* required by the Probation Officer[,]” improperly delegated to the probation officer “unfettered authority” to decide, in the first instance, whether appellant should be required to participate in the program. (*Italics added.*) We agree.

Article III, section 3 of the California Constitution provides, “The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” Judicial power is in the courts and their function is to declare the law and determine the rights of parties in controversy before the court. (*Marin Water etc. Co. v. Railroad*

Com. (1916) 171 Cal. 706, 711–712.) Probation officers serve under the discretion of the court and are authorized to manage aspects of sentences and to supervise probationers and persons on supervised release with respect to all conditions imposed by the court. (See Pen. Code § 1203, subd. (a); *United States v. Johnson* (4th Cir. 1995) 48 F.3d 806, 808.) It is well established, however, that a court may not delegate a judicial function to a probation officer, as such delegation would violate Article III. (See *United States v. Johnson*, at pp. 808–809.) Determination of whether a court has improperly delegated the judicial authority of sentencing is based on distinguishing between the delegation to a probation officer of “a ministerial act or support service” and the “ultimate responsibility” of imposing sentence. (See *United States v. Bernardine* (11th Cir. 2001) 237 F.3d 1279, 1283.)

Courts generally agree that “where the court makes the determination of *whether* a defendant must abide by a condition, and *how* (or, when the condition involves a specific act such as drug testing, *how many times*) a defendant will be subjected to the condition, it is permissible to delegate to the probation officer the details of where and when the condition will be satisfied.” (*United States v. Stephens* (9th Cir. 2005) 424 F.3d 876, 880.) In other words, where a trial court unequivocally imposes a requirement on the defendant, but subjects the defendant to the “approval” or “direction” of a probation officer, such delegations are permissible. (*People v. Penoli, supra*, 46 Cal.App.4th at pp. 307–309 [no impermissible delegation authorizing probation department to select residential drug rehabilitation program and determine whether successfully completed]; *United States v. Kerr* (8th Cir. 2006) 472 F.3d 517, 523–524 [finding no impermissible delegation to probation officer where the district court made no indication it was relinquishing final authority over defendant’s treatment]; *United States v. Zinn* (11th Cir. 2003) 321 F.3d 1084, 1092 [no error in imposing condition that required defendant to participate as directed in a program of mental health treatment approved by the probation officer].)

Requiring a defendant to participate in a drug or mental health treatment program as a condition of supervised release is indisputably a judicial function. Delegating to the

probation officer the authority to decide *whether* a defendant will participate in a treatment program is a violation of Article III. (See *United States v. Esparza* (9th Cir. 2009) 552 F.3d 1088, 1089–1090 [court improperly delegated the decision of whether the defendant needed inpatient treatment to the probation officer]; *United States v. Nash* (11th Cir. 2006) 438 F.3d 1302, 1306 [finding improper delegation where court imposed condition of supervised release that stated defendant “ ‘shall’ ” participate in mental health counseling “ ‘as deemed necessary’ ” by the probation officer]; *United States v. Heath* (11th Cir. 2005) 419 F.3d 1312, 1315 [court improperly delegated the decision of whether the defendant had to participate in mental health treatment as a condition of supervised release to the probation officer]; *United States v. Peterson* (2d Cir. 2001) 248 F.3d 79, 85 [“If [the defendant] is required to participate in a mental health intervention only if directed to do so by his probation officer, then this special condition constitutes an impermissible delegation of judicial authority to the probation officer”]; see also *United States v. Pruden* (3d Cir. 2005) 398 F.3d 241, 251 [expressing agreement with *Peterson*]; *United States v. Allen* (1st Cir. 2002) 312 F.3d 512, 515–516 [same]; *United States v. Sines* (7th Cir. 2002) 303 F.3d 793, 799 [“[A] district court . . . must itself impose the actual condition requiring participation in a sex offender treatment program”]; *United States v. Kent* (8th Cir. 2000) 209 F.3d 1073, 1079 [finding “that the lower court improperly delegated a judicial function to [the defendant’s] probation officer when it allowed the officer to determine whether [the defendant] would undergo counseling”].)

As written, the program enrollment condition cannot stand. However, we decline to simply strike the condition. The Legislature has given trial courts the authority and discretion to make sentencing choices, including whether to place a defendant on probation and if so, what the conditions of probation should be. (See *Lent, supra*, 15 Cal.3d at p. 486.) Here, because the record does not indicate the nature of the Community Corrections Services Center program, we cannot determine whether the probation condition was appropriately imposed in light of the facts of the case and the purpose of the requirement to be imposed on appellant. Furthermore, it is unclear

whether this condition is duplicative of other conditions requiring appellant to enroll in an anger management program (No. 15), and in a cognitive behavioral therapy program (No. 16). What is apparent is that appellant is an individual in need of supervision. Under these circumstances, we consider it appropriate to preserve the trial court's sentencing prerogative in this case and remand the matter for it to reconsider the imposition of a Community Corrections Services Center program enrollment requirement that can pass constitutional muster.

2. *Related Drug/Chemical Testing Condition (No. 18)*

In light of the remand required regarding the program enrollment condition (No. 17), the related drug/chemical testing condition (No. 18), which is applicable *only if* appellant is required to participate in the program enrollment condition (No. 17), necessarily cannot stand. Aside from the fact the contingent nature of this condition, it arguably violates *Lent*, in that drugs were not involved in the underlying offense and because appellant does not have a history of substance abuse it would not likely relate to preventing future criminality. Further, the condition could be construed as being both overbroad and vague, to the extent it purports to prohibit appellant from taking “non-prescribed . . . substances.” These “substances” ostensibly could include over the counter medication, the consumption and possession of which is not itself criminal conduct. As with the program enrollment condition, we are hesitant to strike this condition. On this record, we cannot determine whether this condition is appropriate in light of the facts of this case. The trial court considered it necessary to impose a condition requiring appellant to take all prescribed medication (No. 19). It is unclear whether the drug/chemical testing condition (No. 18) requirement was related to the goal of ensuring that appellant takes his prescribed medication and preventing any possible interference with his medication. It is also unknown if medical marijuana would be appropriate as part of his treatment plan.

We therefore remand with directions to the trial court to reconsider whether this condition should be imposed, and if so, to modify the condition in light of the facts of the case and the purpose of the requirement to be imposed.

III. DISPOSITION

The case is remanded to the trial court with directions to reconsider the Community Correction Service Center program condition (No. 17), the related condition requiring appellant to submit to chemical testing and prohibiting the consumption and possession of non-prescribed or illegal substances including medical marijuana (No. 18), and to determine whether the conditions should be imposed, modified, or stricken. In all other respects the judgment and order of formal probation are affirmed.

Reardon, J.*

We concur:

Streeter, Acting P.J.

Lee, J.**

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

** Judge of the Superior Court of California, City and County of San Mateo, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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